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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 CARL RAY JACKSON,
12 CDCR # T-83472

13 Plaintiff,

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15 vs.
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18 CALIFORNIA DEP'T OF CORRECTIONS
19 AND REHABILITATION; HENRY
20 PROVENCHER; F. MORSHEDIAN; GARY
THOMAS,,
21

22 Defendants.
23
24

Civil No. 10cv1561 H (BLM)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE AND GARNISHING
\$350.00 BALANCE FROM
PRISONER TRUST ACCOUNT
[Doc. No. 2];**

**(2) DENYING MOTION FOR
APPOINTMENT OF COUNSEL
[Doc. No. 3]**

AND

**(3) DISMISSING ACTION FOR
SEEKING MONETARY DAMAGES
AGAINST DEFENDANTS WHO ARE
IMMUNE AND FOR FAILING TO
STATE A CLAIM PURSUANT
TO 28 U.S.C. §§ 1915(e)(2)(B)
& 1915A(b)**

25 Plaintiff, a state inmate currently incarcerated at the California Substance Abuse
26 Treatment Facility located in Corcoran, California, and proceeding pro se, has filed a civil rights
27 Complaint pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated
28 by 28 U.S.C. § 1914(a); instead, he has filed a Motion to Proceed *In Forma Pauperis* ("IFP")

1 pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2], along with a Motion for Appointment of Counsel
2 [Doc. No. 3]

3 **I.**

4 **MOTION FOR APPOINTMENT OF COUNSEL [Doc. No. 3]**

5 Plaintiff requests the appointment of counsel to assist him in prosecuting this civil action.
6 The Constitution provides no right to appointment of counsel in a civil case, however, unless an
7 indigent litigant may lose his physical liberty if he loses the litigation. *Lassiter v. Dept. of Social*
8 *Services*, 452 U.S. 18, 25 (1981). Nonetheless, under 28 U.S.C. § 1915(e)(1), district courts are
9 granted discretion to appoint counsel for indigent persons. This discretion may be exercised
10 only under “exceptional circumstances.” *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9th Cir. 1991).
11 “A finding of exceptional circumstances requires an evaluation of both the ‘likelihood of success
12 on the merits and the ability of the plaintiff to articulate his claims pro se in light of the
13 complexity of the legal issues involved.’ Neither of these issues is dispositive and both must be
14 viewed together before reaching a decision.” *Id.* (quoting *Wilborn v. Escalderon*, 789 F.2d
15 1328, 1331 (9th Cir. 1986)).

16 The Court denies Plaintiff’s request without prejudice, as neither the interests of justice
17 nor exceptional circumstances warrant appointment of counsel at this time. *LaMere v. Risley*,
18 827 F.2d 622, 626 (9th Cir. 1987); *Terrell*, 935 F.2d at 1017.

19 **II.**

20 **MOTION TO PROCEED IFP**

21 All parties instituting any civil action, suit or proceeding in a district court of the United
22 States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28
23 U.S.C. § 1914(a). An action may proceed despite a party’s failure to pay only if the party is
24 granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Andrews v. Cervantes*, 493
25 F.3d 1047, 1051 (9th Cir. 2007); *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999).
26 Prisoners granted leave to proceed IFP however, remain obligated to pay the entire fee in
27 installments, regardless of whether the action is ultimately dismissed for any reason. *See* 28
28 U.S.C. § 1915(b)(1) & (2).

1 The Court finds that Plaintiff has submitted a certified copy of his trust account statement
 2 pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. Plaintiff's trust account statement
 3 shows that he has insufficient funds from which to pay an initial partial filing fee.

4 Accordingly, the Court **GRANTS** Plaintiff's Motion to Proceed IFP [Doc. No. 2] and
 5 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the Court further
 6 orders the Secretary of the California Department of Corrections and Rehabilitation ("CDCR")
 7 to garnish the entire \$350 balance of the filing fees owed in this case, collect and forward them
 8 to the Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
 9 § 1915(b)(1).

10 III.

11 SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)

12 The Prison Litigation Reform Act ("PLRA")'s amendments to 28 U.S.C. § 1915 also
 13 obligate the Court to review complaints filed by all persons proceeding IFP and by those, like
 14 Plaintiff, who are "incarcerated or detained in any facility [and] accused of, sentenced for, or
 15 adjudicated delinquent for, violations of criminal law or the terms or conditions of parole,
 16 probation, pretrial release, or diversionary program," "as soon as practicable after docketing."
 17 See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these provisions, the Court must sua
 18 sponte dismiss any prisoner civil action and all other IFP complaints, or any portions thereof,
 19 which are frivolous, malicious, fail to state a claim, or which seek damages from defendants who
 20 are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-
 21 27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443, 446 n.1 (9th Cir.
 22 2000) (§ 1915A).

23 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
 24 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However, 28
 25 U.S.C. § 1915(e)(2) and § 1915A now mandate that the court reviewing an IFP or prisoner's suit
 26 make and rule on its own motion to dismiss before directing that the Complaint be served by the
 27 U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 ("[S]ection 1915(e) not only permits,
 28 but requires a district court to dismiss an in forma pauperis complaint that fails to state a

claim.”); *see also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing § 1915A).

“[W]hen determining whether a complaint states a claim, a court must accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff.” *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). Here, however, even presuming Plaintiff’s factual allegations true, the Court finds his Complaint both fails to state a claim upon which relief can be granted and seeks monetary relief from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B); 1915A(b); *Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446, n.1.

Where the running of the statute of limitations is apparent on the face of the complaint, dismissal for failure to state a claim is proper. *See Cervantes v. City of San Diego*, 5 F.3d 1273, 1276 (9th Cir. 1993). Because section 1983 contains no specific statute of limitation, federal courts apply the forum state’s statute of limitations for personal injury actions. *Jones v. Blanas*, 393 F.3d 918, 927 (9th Cir. 2004); *Maldonado v. Harris*, 370 F.3d 945, 954 (9th Cir. 2004); *Fink v. Shedler*, 192 F.3d 911, 914 (9th Cir. 1999). Before 2003, California’s statute of limitations was one year. *Jones*, 393 F.3d at 927. Effective January 1, 2003, the limitations period was extended to two years. *Id.* (citing CAL. CIV. PROC. CODE § 335.1). The two-years limitations period, however, does not apply retroactively. *Canatella v. Van de Kamp*, 486 F.3d 1128, 1132-22 (9th Cir. 2007) (citing *Maldonado*, 370 F.3d at 955).

Unlike the length of the limitations period, however, “the accrual date of a § 1983 cause of action is a question of federal law that is not resolved by reference to state law.” *Wallace v. Kato*, 549 U.S. 384, 388 (2007); *Hardin v. Staub*, 490 U.S. 536, 543-44 (1989) (federal law governs when a § 1983 cause of action accrues). “Under the traditional rule of accrual ... the tort cause of action accrues, and the statute of limitation begins to run, when the wrongful act or omission results in damages.” *Wallace*, 549 U.S. at 391; *see also Maldonado*, 370 F.3d at 955 (“Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action.”).

1 Here, Plaintiff claims that Defendants violated his constitutional rights when he was
2 released on parole in October of 2006. *See* Compl. at 1, 3. Plaintiff alleges that Defendants
3 knew or should have known that he was a “significant risk to the community” and mentally ill.
4 *Id.* at 3. As a result, Plaintiff was later “arrested, charged and convicted of committing a violent
5 crime.” *Id.* Based on these allegations, Plaintiff would have reason to believe that his
6 constitutional rights were violated in October of 2006. *Wallace*, 549 U.S. at 391.; *see also*
7 *Maldonado*, 370 F.3d at 955. However, Plaintiff did not file his Complaint in this case until
8 July 23, 2010, which exceeds California’s statute of limitation. *See* CAL. CODE CIV. PROC.
9 § 335.1; *Jones*, 393 F.3d at 927.

10 Plaintiff does not allege any facts to suggest how or why California’s two-year statute
11 of limitations might be tolled for a period of time which would make his claims timely. *See*,
12 *e.g.*, CAL. CODE CIV. P. § 352.1 (tolling statute of limitations “for a maximum of 2 years” during
13 a prisoner’s incarceration); *Fink v. Shedler*, 192 F.3d 911, 916 (9th Cir. 1999) (finding that CAL.
14 CODE CIV. P. § 352.1 tolls a California prisoner’s personal injury claims accruing before January
15 1, 1995 for two years, or until January 1, 1995, whichever occurs later, unless application of the
16 statute would result in a “manifest injustice.”). It is not clear when Plaintiff, once again, became
17 incarcerated following his release on parole. While Plaintiff may be entitled to additional
18 tolling based on his subsequent incarceration, it is not clear from Plaintiff’s Complaint if he is
19 entitled to the additional statutory tolling.

20 Generally, federal courts also apply the forum state’s law regarding equitable tolling.
21 *Fink*, 192 F.3d at 914; *Bacon v. City of Los Angeles*, 843 F.2d 372, 374 (9th Cir. 1988). Under
22 California law, however, a plaintiff must meet three conditions to equitably toll a statute of
23 limitations: (1) he must have diligently pursued his claim; (2) his situation must be the product
24 of forces beyond his control; and (3) the defendants must not be prejudiced by the application
25 of equitable tolling. *See Hull v. Central Pathology Serv. Med. Clinic*, 28 Cal. App. 4th 1328,
26 1335 (Cal. Ct. App. 1994); *Addison v. State of California*, 21 Cal.3d 313, 316-17 (Cal. 1978);
27 *Fink*, 192 F.3d at 916. Here, however, Plaintiff has failed to plead any facts which, if proved,
28 would support the equitable tolling of his claims. *See Cervantes v. City of San Diego*, 5 F.3d

1 1273, 1277 (9th Cir. 1993). Thus, Plaintiff's entire action must be dismissed as barred by the
 2 statute of limitations.

3 In addition, Plaintiff names the California Department of Corrections and Rehabilitation
 4 ("CDCR") as a Defendant in this matter. The State of California, and the California Department
 5 of Corrections and Rehabilitation, as an agency of the State of California, are not "persons"
 6 subject to suit and are instead, entitled to absolute immunity from monetary damages actions
 7 under the Eleventh Amendment. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 53-54
 8 (1996); *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984); *see also Hale*
 9 *v. State of Arizona*, 993 F.2d 1387, 1398-99 (9th Cir. 1993) (holding that a state department of
 10 corrections is not a "person" within the meaning of § 1983). In order to state a claim under
 11 § 1983, Plaintiff must identify a "person" who, acting under color of state law, deprived him of
 12 a right guaranteed under the Constitution or a federal statute. *See* 42 U.S.C. § 1983.

13 Therefore, Plaintiff's claims for monetary damages against the California Department of
 14 Corrections and Rehabilitation are dismissed with prejudice pursuant to 28 U.S.C.
 15 § 1915(e)(2)(B)(iii).

16 **IV. CONCLUSION AND ORDER**

17 Good cause appearing, **IT IS HEREBY ORDERED:**

18 1. Plaintiff's Motion for Appointment of Counsel [Doc. No. 3] is **DENIED** without
 19 prejudice.

20 2. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2] is
 21 **GRANTED.**

22 3. The Secretary of California Department of Corrections and Rehabilitation, or his
 23 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing fee
 24 owed in this case by collecting monthly payments from the account in an amount equal to twenty
 25 percent (20%) of the preceding month's income and forward payments to the Clerk of the Court
 26 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).
 27 **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER**
 28 **ASSIGNED TO THIS ACTION.**


5. Plaintiff's Complaint is **DISMISSED** for as barred by the applicable statute of limitations, for seeking monetary damages against immune defendants and for failing to state a claim upon which relief could be granted. *See* 28 U.S.C. §§ 1915(e)(2)(b) & 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave from the date this Order is "Filed" to file a First Amended Complaint which cures all the deficiencies of pleading noted herein. Plaintiff's Amended Complaint must be complete in itself without reference to the original pleading. *See* S. D.CAL. CIVLR. 15.1. Defendants not named and all claims not recited in the Amended Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 1065, 1067 (9th Cir. 1987).

Further, if Plaintiff's Amended Complaint still fails to state a claim upon which relief may be granted, it may be dismissed without further leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

6. The Clerk of the Court is directed to mail a form civil rights Complaint to Plaintiff.

IT IS SO ORDERED.

Dated: September 17, 2010


MARILYN L. HUFF, District Judge
UNITED STATES DISTRICT COURT